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No. 96-643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,
v.
CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE CLEAN AIR IMPLEMENTATION PROJECT IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court,[1] the *Amicus Curiae*, Clean Air Implementation Project, files this brief in support of the petitioner, The Steel Company. The Clean Air Implementation Project (CAIP) is a nonprofit trade association whose members represent a broad cross-section of American industry.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The members of CAIP consist of 22 major corporations in the chemical, petroleum, pharmaceutical, and other industries. CAIP regularly addresses issues of interest to its members relating to the development and implementation of requirements under federal and state clean air programs. In particular, CAIP has participated on behalf of its members in major rulemaking proceedings involving the implementation of the Clean Air Act by the United States Environmental Protection Agency (EPA) and has submitted extensive comments in those proceedings. CAIP also has brought judicial challenges to a number of final rules promulgated by EPA under the Clean Air Act.

CAIP adopts and supports petitioner's argument for reversal of the decision below on grounds that citizen suits under section 326 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046 (1994), may not be brought to seek civil penalties for wholly past violations, as the Sixth Circuit held in *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473 (6th Cir. 1995). This brief is submitted to supplement that argument by bringing to the Court's attention the fact that the Seventh Circuit in its opinion in this case misconstrued the citizen suit provisions of the Clean Air Act.

INTRODUCTION

In reaching its decision in the instant case, the Seventh Circuit relied in part on Congress' amendment of the Clean Air Act citizen suit provision in 1990. The court of appeals stated that the amendment "permit[ted] citizen enforcement actions for past violations, yet left the notice provision intact." Pet. App. A13. According to the court of appeals, the fact that Congress had, in its view, authorized citizen suits under the Clean Air Act for past violations that had been corrected, but had not altered the provision requiring that a plaintiff provide 60 days'

notice to the alleged violator before filing suit, undercut one of the bases for this Court's decision in *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). The Seventh Circuit's belief that this portion of the *Gwaltney* decision "is no longer as compelling as it was when *Gwaltney* was decided" helped lead that court to conclude that the "for failure to" language in the EPCRA citizen suit provision should be read as allowing citizen suits for wholly past violations. Pet. App. A13.

In *Gwaltney*, this Court relied in part on an essentially identical 60-day notice provision to conclude that the "to be in violation" language in the Clean Water Act citizen suit provision does not encompass past violations that are not ongoing. The Court concluded that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act" and that, if citizen suits may target past violations that are not ongoing, "the requirement of notice to the alleged violator becomes gratuitous." 484 U.S. at 60.

The question addressed in this brief is whether Congress, in amending section 304(a)(1) of the Clean Air Act, 42 U.S.C. § 7604(a)(1) (1994), intended to authorize citizen suits for the recovery of civil penalties for violations that are not "ongoing." By an "ongoing violation," we mean a violation which is continuing and for which injunctive relief is required to compel the facility to take the necessary steps to achieve a state of "ongoing" compliance. This brief challenges the Seventh Circuit's construction of the language in section 304(a)(1) establishing jurisdictional prerequisites for citizen suits, and explains why Congress only authorized citizen suits for civil penalties in much more limited circumstances than would be permissible under that court's interpretation.

In 1990, Congress amended the citizen suit authorization in section 304 of the Clean Air Act in two notable respects. Most significantly, it provided that, in actions where citizens are awarded injunctive relief, they also may

seek civil penalties payable to the federal government of up to $25,000 per day of violation. Pub. L. No. 101-549, 104 Stat. 2674, 2682. Previously, citizens could only bring actions for injunctive relief. In addition, Congress revised the jurisdictional grounds for citizen suits by adding language which provides that citizens can bring actions where "the alleged violation has been repeated." *Id.* at 2683. It retained the authorization in the pre-1990 version of section 304(a)(1) for actions where a source is alleged "to be in violation." Congress did not revise the provision requiring 60 days' prior notice before citizen suits can be initiated.

Interpreting the citizen suit authorization only to permit actions for civil penalties where violations are ongoing and where injunctive relief is thus necessary is particularly critical under the Clean Air Act. Many major sources of air emissions are subject to dozens of different emission limitations, often set as hourly limits, that apply to hundreds of different pieces of equipment. Typically, these emission limitations were established based on use of a particular control technology. Because EPA and states did not have sufficient data to establish standards based on continuous monitoring, they provided in many instances for the "exclusive" method for making compliance determinations to be through periodic performance of a "reference test" under specified operating conditions. Compliance at other times was to be demonstrated by performing operations and maintenance consistent with good air pollution control practices. As additional data have been generated, EPA and state agencies have come to recognize that properly controlled, well-operated sources will, from time to time, have emissions that are above the emission limitations due to normal emissions variability. In the past, these emission excursions did not constitute violations.

On February 24, 1997, EPA promulgated a rule that revises federal regulations to provide that such reference tests shall no longer be the exclusive method for proving

violations of emission limitations. Credible Evidence Revisions: Final Rule, 62 Fed. Reg. 8314 (1997). Under that rule, EPA provides that emissions information not gathered under the same conditions as reference tests can be used to prove violations in federal and state enforcement actions and in citizen suits under section 304 of the Clean Air Act. This rule was adopted without analyzing the compliance implications for the thousands of standards it affects. For a large number of standards, the implications will be that regulated facilities—despite the installation of required control technology coupled with good operations and maintenance—will not be able to show compliance, as determined under this new rule, 100% of the time. Performance that constituted compliance in the past will now be potentially subject to enforcement as noncompliance. For these reasons, numerous industry trade associations and individual companies have filed more than 80 petitions for review with the U.S. Court of Appeals for the District of Columbia Circuit challenging either the final rule itself or the revisions the rule makes to the compliance determination provisions for numerous federal standards. *Clean Air Implementation Project v. EPA*, Nos. 97-1117 *et al.* (D.C. Cir.).

In adopting this new rule, EPA recognized that the rule has the potential to result in unavoidable emission excursions now becoming the target of enforcement actions. As a consequence, EPA discussed at length the enforcement policies it will pursue in the preamble to the final rule. Specifically, EPA pointed out that it will "exercise prosecutorial discretion" in circumstances that will routinely arise with respect to many limitations at facilities that are well controlled and operated. 62 Fed. Reg. at 8318. Without such prosecutorial discretion, many sources would, and in many cases still will, face the Hobson's choice of curtailing plant operations or installing expensive controls that achieve little or no environmental benefit.

The practical implications of this rule for citizen suit litigation are enormous. Now, citizen groups will likely

argue that they should be able to recover civil penalties for random, but in the aggregate significant in number, emission excursions—even though facilities have taken every action envisioned at the time applicable standards were set. Despite EPA's stated intention to exercise "prosecutorial discretion," citizen groups are not bound to follow the Agency's enforcement policies. Under the Clean Water Act, citizen suits have often been successfully brought—even after the *Gwaltney* decision—in situations where the facility was taking the steps to control its effluent discharges that EPA and state agencies believed appropriate. The nature and extent of air emission control requirements will make this a much more pervasive problem under the Clean Air Act. The numbers of individual emission points subject to limitations on air emissions at a single facility are commonly orders of magnitude greater under the Clean Air Act than the outfalls regulated under the Clean Water Act. As a consequence, the potential for frivolous or disruptive citizen group actions where EPA and states intend to exercise prosecutorial discretion is staggering.

While the interpretation of the Clean Air Act's citizen suit provision is not before this Court, the Seventh Circuit's matter-of-fact reference to its conclusion that the Clean Air Act authorizes actions for past violations is merely the prelude to the federal court litigation that will ensue in response to the expected avalanche of citizen suits. Initiation of such litigation will be a simple matter once industrial facilities, beginning in the next few years, are required under EPA's regulations to file semiannual monitoring reports. 40 C.F.R. § 70.6(a)(3)(iii)(A) (1996). This expectation is based upon experience under the Clean Water Act where the submission of similar reports also triggered the filing of vast numbers of citizen suits.

This Court's decision in this case will, like *Gwaltney*, be a key precedent for courts in interpreting the Clean

Air Act. However, as explained below, the *Gwaltney* decision has been misapplied in many citizen suits. The message from the Court's opinion seemed clearly to be that citizen suits for civil penalties are permissible only where a real noncompliance problem exists. But district courts have interpreted the Court's references to the permissibility of citizen suits where there are "intermittent" violations as authorizing citizen suits for civil penalties where injunctive relief is neither required nor granted, because no need exists for the facility to take corrective action.

Accordingly, unless this Court makes clear that citizens suits may only be brought where violations are "ongoing" and that the test for determining whether they are ongoing is that injunctive relief must be necessary to compel the facility to come into compliance, it is likely that some federal courts will interpret section 304 of the Clean Air Act to permit citizen suits for civil penalties where a noncompliance problem does not exist. As we further argue in this brief, if courts decide to interpret section 304 to allow such actions, citizen groups cannot satisfy the prerequisites for Article III standing and thus those actions should be found impermissible under the Constitution.

Even if this Court's decision prescribes very narrow criteria that make clear that citizen suits for civil penalties may only be brought where injunctive relief is necessary to require correction of a real ongoing noncompliance problem, the citizen suit authorization under the Clean Air Act will still likely be abused in many circumstances. As the foregoing indicates, EPA and states will routinely choose to exercise prosecutorial discretion with respect to numerous emission limitations at vast numbers of facilities throughout the country in order to implement the Clean Air Act in a manner that will not be grossly unfair to American industry. Not being bound by such government decisions, citizen groups will be able to wield the $25,000 per day penalty enforcement weapon under the

Clean Air Act in a manner that will routinely conflict with the Executive's exercise of its prosecutorial discretion.[2] Rather than face risks of massive penalties for inconsequential excursions that may be construed to be violations, facilities will often conclude they should opt to avoid this risk and agree to pay penalties in amounts that are lesser, but nonetheless significant.

With narrowly drawn criteria, this Court's decision could significantly reduce the potential for misapplication and abuse of the Clean Air Act's authorization for citizens to seek civil penalties—both in federal court litigation and settlements with citizen groups. Absent such clear direction, the likelihood exists that there will be a significant encroachment on the prosecutorial discretion of the Executive. For this reason, it is likely that a petitioner in a future case will call upon this Court to find the Clean Air Act citizen suit authorization unconstitutional as a violation of separation of powers.

SUMMARY OF ARGUMENT

As amended in 1990, section 304(a)(1) of the Clean Air Act authorizes citizens to bring actions to seek injunctive relief "and . . . appropriate civil penalties" payable to the federal government. Such actions may only be brought where the emissions source is "alleged to be in violation" or where "the alleged violation has been repeated." When read in conjunction with Congress' dictate that citizens' actions for civil penalties are permissible only where injunctive relief is necessary, it is clear that Congress' jurisdictional prerequisites, including the authorization of actions for "repeated" violations, necessitate that violations be "ongoing." Otherwise, no

[2] The huge amounts of civil penalties which citizen groups can seek from industrial facilities are well illustrated by this case, where the plaintiff sought penalty amounts of more than $537 million based on The Steel Company's alleged failure—promptly corrected upon notification—to file two different forms required by EPCRA.

need exists for granting injunctive relief to correct a noncompliance problem, the necessary condition precedent to awarding civil penalties.

Thus, under the most reasonable reading of the jurisdictional criteria in section 304(a)(1), citizen suits for civil penalties may be brought in much more limited circumstances than the Seventh Circuit's opinion indicates. Congress' retention of the "alleged to be in violation" criterion can best be read, as Justice Scalia explained in his concurring opinion in *Gwaltney*, to authorize actions where the source clearly is not in a "state" of compliance, and thus citizens can properly seek injunctive relief. The "repeated" violation criterion also must be read to permit citizen suits only where injunctive relief is required. Here again, a showing of "ongoing" noncompliance, albeit of a slightly different nature, is required. To meet that test, the violation must not only have occurred repeatedly, there must be a virtual certainty that the same violation will recur in the future. But the essential prerequisite is that injunctive relief is required to compel ongoing compliance.

The interpretation of section 304(a)(1) as only authorizing citizen suits based on violations that are ongoing is also supported by Congress' choice of language in simultaneously amending the provisions addressing EPA's enforcement authority. In those provisions, Congress clearly authorized EPA, in contrast to its authorization for suits brought by private citizens, to pursue judicial or administrative enforcement actions whether or not the violations in question are "ongoing."

The language of section 304(a)(1) should additionally be construed narrowly in order to avoid interference with EPA's enforcement authority and prosecutorial discretion. As this Court stated in *Gwaltney*, citizen suits are intended to "supplement" rather than to "supplant" EPA's enforcement efforts. 484 U.S. at 60. Construing section 304

(a)(1) to authorize citizen suits for civil penalties based on violations that are not ongoing would greatly interfere with EPA's exercise of prosecutorial discretion.

Contrary to the Seventh Circuit's conclusion, the fact that Congress in 1990 amended the language of section 304(a)(1), but chose not to alter the language of the 60-day notice provision in section 304(b), does not mean that Congress intended to authorize the filing of citizen suits based on violations that are not ongoing. Indeed, precisely the opposite is true. Congress' decision not to alter the notice provision further supports reading the language in section 304(a)(1), including that added in 1990, as authorizing citizen suits based on past violations only where injunctive relief is required to compel ongoing compliance. Notice to the alleged violator will provide it the opportunity to take any necessary corrective action within the 60-day notice period and thereby make filing a civil action unnecessary.

The section 304(a)(1) jurisdictional prerequisites should be interpreted not to encompass violations that are not ongoing for a separate, compelling reason. Such a reading would violate the "case or controversy" requirement of Article III. To invoke federal court jurisdiction, a plaintiff must satisfy the three-part test for Article III standing established by this Court. However, a citizen-plaintiff seeking the recovery of civil penalties based on violations that are not ongoing cannot meet either the "injury-in-fact" or "redressability" prongs of that test. Such a citizen-plaintiff will not be able to demonstrate that it is suffering from a continuing "concrete and personalized" injury and that any alleged injury to it can be redressed by a defendant's payment of civil penalties to the federal government. For these reasons, section 304(a)(1) must be given the narrow interpretation delineated in this brief.

ARGUMENT

SECTION 304(a)(1) OF THE CLEAN AIR ACT SHOULD BE CONSTRUED AS ONLY AUTHORIZING CITIZEN SUITS FOR ONGOING VIOLATIONS.

A. Under Section 304(a)(1), A Citizen Suit Seeking Civil Penalties May Be Brought Only Where Injunctive Relief Is Also Necessary To Compel The Facility To Come Into Compliance With Applicable Emission Requirements.

As this Court stated in *Gwaltney*, "[i]t is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Id.* at 56 (quoting *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Section 304(a)(1) of the Clean Air Act, as amended, provides in relevant part that a person may commence a civil action on his or her own behalf

> against any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .

In the Clean Air Act Amendments of 1990, Congress added the phrase—"to have violated (if there is evidence that the alleged violation has been repeated)"—to the prior version of section 304(a)(1). Pub. L. No. 101-549, 104 Stat. 2683. The pre-1990 version of section 304(a)(1) stated that a citizen suit could be brought under that provision where a person "is alleged to be in violation." That language was essentially identical to the language of section 505(a) of the Clean Water Act, the corresponding citizen suit provision of that statute.

Congress also made one additional significant change to the citizen suit authorization. It amended section 304

(a)(1) to authorize district courts to award citizens injunctive relief "and to apply any appropriate civil penalties." The pre-1990 statute only provided for injunctive relief to be granted.

In *Gwaltney*, this Court construed the phrase "is alleged to be in violation" contained in section 505(a) of the Clean Water Act and held that the citizen-plaintiff must allege (and ultimately prove) the existence of an "ongoing violation." 484 U.S. at 67. In his concurring opinion, Justice Scalia explained that "the phrase 'to be in violation' . . . suggests a state rather than an act—the opposite of a state of compliance." Elaborating on the majority opinion, he stated that a defendant in a state of violation would remain in violation until it corrected the problem even if it had a "good or lucky day" on which it did not violate the standard in question. *Id.* at 69.

Congress' decision to amend section 304(a)(1) apparently indicates that, for purposes of the Clean Air Act, Congress believed that the authority to bring citizen suits should extend in prescribed circumstances to cover noncompliance in addition to the situations where compliance only occurs on the "good or lucky day." However, the additional language chosen by Congress should nonetheless be interpreted only to authorize the filing of citizen suits to recover civil penalties for past violations that are ongoing, *i.e.*, violations which are virtually certain to recur and require injunctive relief to compel compliance.[3]

[3] The statements in the legislative history concerning the language added to section 304(a)(1) generally do not shed much light on Congress' precise intent in amending the provision. However, Rep. Fields, one of the House-Senate conferees, did attempt to provide an explanation regarding what situations would fall under the new language:

> Citizen suits are generally inappropriate for past violations. The conferees narrowed the House provision which required only an allegation of repeated or continuous past violations. The conferees agreed that citizens should be required to present competent evidence of past violations and that the evidence demonstrate repeated violations. . . . The evidence must demonstrate that the past violations were frequent, that the alleged violator habitually ignored applicable requirements and that the agency did not adequately enforce the law.

136 Cong. Rec. E3677 (daily ed. Nov. 2, 1990).

Perhaps the most significant aspect of the language added to section 304(a)(1) by the 1990 amendments is that Congress made clear that citizens may only bring actions for civil penalties where injunctive relief must be awarded to compel compliance. In amending the citizen suit authorization, Congress added the phrase "and to apply any appropriate civil penalties . . ." to the sentence in the pre-1990 law authorizing district courts to award injunctive relief. Pub. L. No. 101-549, 104 Stat. 2682. Congress' use of the conjunction "and" demonstrates that jurisdiction to impose civil penalties is limited to circumstances where injunctive relief is necessary. A court may, however, assess civil penalties only where it deems this additional relief to be "appropriate."

Another significant aspect of the language added to section 304(a)(1) by the 1990 amendments is that Congress made clear that a past violation by itself would *not* be sufficient to provide the basis for a citizen suit. Although Congress inserted the words "to have violated," Congress immediately qualified those words with the following parenthetical phrase: "(if there is evidence that the alleged violation has been repeated)." As this Court ruled in *Gwaltney*, the fact that Congress chose not to phrase a citizen suit provision using language that looked solely to the past is entitled to substantial weight in determining whether Congress intended to authorize citizen suits based on violations that are not ongoing.[4] 484 U.S. at 57.

[4] Only a few district courts have thus far addressed the issue of how section 304(a)(1) should be interpreted. The court in *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561, 1565 (N.D. Ga.

Based on the statutory language and the Clean Air Act's overall enforcement scheme, the most reasonable reading of section 304(a)(1), as amended, is that citizen suits can be brought based on past violations only under a very narrow set of circumstances. The language added to section 304(a)(1) requires that a past violation be a "repeated" violation to provide the basis for a citizen suit. The word "repeated" means "said, done, or occurring again and again."[5] Thus, Congress' choice of language indicates that Congress intended that a past violation, to provide the basis for a citizen suit, must be one which has recurred and will continue to recur, unless corrected.

For a violation to be "repeated," it must involve the same limitation and the same piece of equipment within the facility.[6] In other words, Congress intended that sec-

1994), stated that "courts will not allow citizens to file suits based on violations that have been corrected. The Clean Air Act citizen suit is not intended to be a windfall for plaintiffs. Rather, it is intended to encourage and enforce compliance with environmental regulations." Other district courts have construed section 304(a)(1) differently. *E.g., Adair v. Troy State Univ. of Montgomery*, 892 F. Supp. 1401 (M.D. Ala. 1995).

[5] The American Heritage Dictionary (2d Coll. ed.) (1985).

[6] A large industrial facility regulated under the Clean Air Act will typically contain dozens or even hundreds of discrete sources of air emission ranging from small valves to huge smokestacks—with virtually every individual emission point being subject to one or more emission standards for various pollutants. Thus, for purposes of the Clean Air Act, the concept of a violation being a repeated violation makes sense only if the same violation must involve the same piece of equipment, the same pollutant, and the same underlying cause. If, instead, a repeated violation were construed to mean merely an exceedance of the same standard by any emissions unit anywhere in the facility, there would typically be no relationship between the two occurrences whatsoever and no basis for concluding that a violation was being repeated. For example, if a tank in one part of a facility and a tank in another part of the facility both happen to violate the same standard regulating emissions of volatile organic compounds (VOCs), there would be no proper basis for concluding that these events could involve a pattern of repeated

tion 304(a)(1) authorize actions where a specific violation has occurred frequently or as part of a pattern and where, despite the frequency or pattern of this same violation, the facility has not taken action to correct the specific cause of the violation. Accordingly, in such a situation, there is a virtual certainty that the violation will recur in the future and necessary corrective action will not be taken unless injunctive relief is granted in either an EPA or citizen enforcement action.

The importance of Congress' choice of words in section 304(a)(1) is further highlighted by the language that Congress simultaneously added in 1990 to the corresponding provisions in section 113 of the Act governing enforcement actions brought by EPA. In prescribing EPA's authority to bring judicial or administrative actions to recover civil penalties, Congress consistently used the phrases "has violated or is in violation of" or "has violated and is violating" without providing any qualification concerning whether a particular violation had been repeated.[7] The decision to use broad, unqualified language in describing EPA's enforcement authority further shows

violations. We note that this situation is typically different from that of a facility being regulated under the Clean Water Act, where all effluents are usually discharged from one outfall or a small number of outfalls and specific requirements do not apply to individual pieces of equipment within the plant. Nevertheless, under the Clean Water Act, the *Gwaltney* decision has been interpreted by some district courts as authorizing actions for civil penalties where the so-called "ongoing" violation was based upon violations of different limits with different causes, not the same limit and the same causes. *See, e.g., Public Interest Research Group of New Jersey v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164, 1173-76 (D. N.J. 1993); *Public Interest Research Group of New Jersey v. Yates Industries, Inc.*, 790 F. Supp. 511, 514-16 (D. N.J. 1991).

[7] For example, this language was included in subsections 113(a)(1), (a)(3), (b)(1), (b)(2), (d)(1)(A), and (d)(1)(B) of the Act (codified at 42 U.S.C. § 7413(a)(1), (b)(1), (b)(2), (d)(1)(A), and (d)(1)(B)). *See* Pub. L. No. 101-549, 104 Stat. 2672, 2673, and 2677.

that Congress did not intend that citizens could bring suit regarding violations that are not ongoing.

The reading of section 304(a)(1) set forth above is also consistent with the principle that the citizen suit provision must be interpreted to avoid intruding on the enforcement authority and prosecutorial discretion of EPA.[8] In *Gwaltney*, the Court pointed out that the proper role of citizen suits is to supplement, rather than supplant, governmental enforcement measures. It stated that permitting citizen suits for past violations that are not ongoing "could undermine the supplementary role envisioned for the citizen suit." 484 U.S. at 60. The Court further discussed an example of the problems which would be created by interpreting citizen suit provisions to authorize

[8] Even when construed narrowly, the citizen suit provisions of the environmental statutes raise serious questions regarding violations of the Constitution's separation of powers. As discussed in the Introduction, this is particularly true under the Clean Air Act. The authority granted to citizens to bring private actions for the recovery of civil penalties is generally interpreted by courts to be identical in many respects to the authority that Congress has delegated to the Executive Branch. Congress' establishment of such an independent private scheme for prosecuting alleged violators of federal law arguably conflicts with the Constitution's Article II grant of powers to the Executive. Since Congress can assign such executive functions only to Presidential appointees, the authorization of private citizens to prosecute for civil penalties appears to violate the separation of powers mandate of the Constitution.

Because this case presents the issue of whether citizens have standing to bring actions for civil penalties based on past violations that are not ongoing, we do not brief the question of whether the Constitution's separation of powers is also violated. A ruling that citizen-plaintiffs may not recover under EPCRA for such violations or that they lack Article III standing to bring such actions would make it unnecessary to address the separation of powers issue, which was not raised in the lower courts. As forecast in the Introduction, the encroachment on the Executive's prosecutorial discretion under the Clean Air Act, however, will likely be so great that this Court will be asked at a future time to find that it violates the separation of powers under the Constitution—even if courts properly construe that statute's citizen suit authorization very narrowly.

civil penalty actions for such past violations. In that hypothetical example, EPA exercised its prosecutorial discretion to agree not to seek civil penalties on the condition that the alleged violator take extraordinary corrective measures that it would otherwise not be required to take. As the Court explained, "[i]f citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61. The teaching of this portion of the *Gwaltney* decision is that citizen suit provisions must be read, whenever possible, to avoid such "potentially intrusive" results.

As discussed in the Introduction, the exercise of prosecutorial discretion under the Clean Air Act will be vastly more important than under any other environmental statute. EPA has recognized that exercising such discretion will be a routine part of its enforcement of numerous requirements applicable to large numbers of emission units at regulated facilities. Under the plain language of the statute, only where a noncompliance concern exists that justifies injunctive relief to achieve compliance are citizen suits permissible, whether under the "alleged to be in violation" or under the alleged "repeated violation" jurisdictional requirements. This interpretation should reduce the otherwise disruptive impacts on EPA's authority to enforce the Clean Air Act's requirements.

Finally, section 304(a)(1) should be read as not authorizing citizen suits for the recovery of civil penalties based on past violations that are not ongoing because the provision otherwise would clearly run afoul of Article III standing requirements. As we discuss under Point C, *infra*, a citizen may bring suit only if it can satisfy the injury-in-fact and redressability requirements for Article III standing. Allowing citizens to bring suit to recover civil penalties for past violations that are not ongoing would be inconsistent with these fundamental jurisdictional prerequisites.

B. The 60-Day Notice Requirement In Section 304(b)(1) Continues To Provide A Period During Which Past Violations Can Be Cured.

This Court's decision in *Gwaltney* relied in part on the conclusion that construing section 505 of the Clean Water Act to allow citizen suits for past violations that are not ongoing "would render incomprehensible § 505's notice provision, which requires citizens to give 60 days' notice of their intent to sue to the alleged violator as well as to the Administrator and the State." 484 U.S. at 59. The Court explained that the purpose of the 60-day notice requirement is to give the alleged violator an opportunity to bring itself into compliance and thereby preclude the need for citizens to file suit. The Court pointed out that the notice requirement would become "gratuitous" if a citizen suit could be based on violations which necessarily cannot be remedied within the 60-day period because they are not ongoing violations. *Id.* at 60. Based in part on this role of the 60-day notice provision, the Court concluded that section 505 of the Clean Water Act should be read as only authorizing the filing of citizen suits based on ongoing violations.

In the instant case, the Seventh Circuit stated that this aspect of the *Gwaltney* decision had been made less compelling by Congress' action in amending section 304(a)(1) of the Clean Air Act in 1990 to add the phrase "to have violated (if there is evidence that the violation has been repeated)." Pet. App. A13. The Seventh Circuit believed it significant that Congress amended section 304(a)(1) but left intact the 60-day notice requirement in section 304(b)(1), which is essentially identical to the notice requirement in the Clean Water Act. In the Seventh Circuit's view, the amendment to section 304 (a)(1) authorized the filing of citizen suits based on past violations that are not ongoing. Therefore, according to that court, the existence of such a 60-day notice requirement in a citizen suit provision can no longer be

used as evidence that Congress intended that citizen suits be based solely on ongoing violations. *Id.*

The Seventh Circuit wrongly interpreted the import of Congress' revision of section 304. There are at least two reasons why Congress did not need to alter the 60-day notice provision in section 304(b).

First, the 60-day notice provision continues to provide an opportunity for defendants who are alleged "to be in violation" to cure the violation. This is the case even though Congress added language to section 304(a)(1) authorizing citizen suits under additional circumstances. It is unremarkable that Congress left the notice provision intact.

Second, Congress did not change the 60-day notice provision because it, in fact, did not intend to authorize the filing of citizen suits based on past violations that are not ongoing. This further supports the proffered interpretation of "repeated violation." As shown above, the most reasonable reading of amended section 304(a)(1) is that Congress intended that a past vioaltion can provide the basis for a citizen suit only if it has been repeated under circumstances where there is a virtual certainty that the same violation will recur in the future unless the problem causing the violation is corrected. Under this interpretation, the notice requirement gives the alleged violator the opportunity to correct the noncompliance problem within 60 days and to show that injunctive relief is not necessary to bring the source into compliance. In short, this interpretation of the statute avoids making the notice requirement "incomprehensible" in accordance with *Gwaltney* and demonstrates that Congress' amendment of section 304(a)(1) in 1990 is consistent with its decision to leave the notice requirement unchanged.

C. Interpreting Section 304(a)(1) To Authorize Citizen Suits To Recover Civil Penalties For Violations That Are Not Ongoing Would Violate The Case Or Controversy Requirement Of Article III Of The Constitution.

Standing is a "threshold question in every federal case," for it determines "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This Court has made clear that the "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In order to establish Article III standing, a would-be plaintiff must make the following three-part showing: (1) that it or its members have personally "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (2) that the injury "fairly can be traced to the challenged action," and (3) that the injury is "likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted).

Section 304(a)(1) of the Clean Air Act must be interpreted in the narrow fashion reviewed above to comport with Article III standing requirements. As this Court reiterated in *Gwaltney*, a plaintiff bringing an action under a federal citizen suit provision must satisfy the Article III standing prerequisites.[9] 484 U.S. at 65-67. As we show below, interpreting section 304(a)(1) as authorizing citizens to bring suit to recover civil penalties for violations

[9] In *Gwaltney*, both Justice Marshall, writing for the majority, and Justice Scalia, writing the concurring opinion, recognized that Article III standing must be established by a citizen-plaintiff. Their only disagreement in this regard concerned the timing under which a citizen-plaintiff would actually be required to offer proof to support its allegations of harm and redressability.

that do not necessitate injunctive relief would run afoul of the Article III "case or controversy" requirement.[10]

1. *A citizen-plaintiff seeking to recover civil penalties can only satisfy the injury-in-fact requirement for Article III standing where a real noncompliance problem exists.*

Under Article III, a plaintiff must allege that it has personally been harmed in an identifiable manner and that it continues to be adversely affected at the time of filing the lawsuit. *Los Angeles v. Lyons*, 461 U.S. 95, 101-03 (1983). To establish the requisite injury-in-fact, the plaintiff must have suffered an invasion of a legally protected interest which is "concrete and personalized" as well as "actual or imminent." *Defenders of Wildlife*, 504 U.S. at 560 (citations omitted).

A citizen attempting to rely on violations that are not ongoing to bring suit under section 304(a)(1) cannot properly allege that there are "present adverse effects" from the violations which constitute the "concrete and personalized" harm required to establish Article III standing. Absent a real noncompliance problem, there are no

[10] The United States agreed with this position in its *amicus curiae* brief in the *Gwaltney* case:

> A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability.

Brief of the United States as *Amicus Curiae* Supporting Affirmance at 21, n.34. However, the government maintained that a citizen plaintiff would lack Article III standing to seek civil penalties for violations that are not such ongoing violations. The government stated that, if Congress "—oblivious to Article III's requirement that a litigant have a personal stake in the controversy—" were to give citizens authority to bring actions seeking penalties for violations that are not ongoing, "it would intrude upon the Executive's responsibility to 'take Care that the Laws be faithfully executed' U.S. Const. Art. III, § 3) and the prosecutorial discretion inherent therein." *Id.* (citation omitted).

present effects on a citizen. To demonstrate the necessary present effects, the citizen-plaintiff must show an ongoing violation and noncompliance requiring injunctive relief to compel compliance. Otherwise, it does not have standing to seek civil penalties.

Even if a citizen-plaintiff could show that it was injured in the past from a particular violation, that will not establish that the citizen-plaintiff has standing to bring an action. The injury to the plaintiff must exist at the time the complaint is filed and must continue until disposition of the case. *Sosna v. Iowa*, 419 U.S. 393, 402 (1974). As this Court has stated, " 'past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.' " *Lyons*, 461 U.S. at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

To invoke the jurisdiction of the federal courts, a plaintiff must "stand to profit in some personal interest." *Allen v. Wright*, 468 U.S. 737, 766 (1984) (citation omitted). A citizen-plaintiff relying on violations that are not ongoing cannot personally profit from its lawsuit. As this Court made clear in *Defenders of Wildlife*, a citizen's generalized grievances concerning enforcement of the laws do not satisfy the injury-in-fact test under Article III. 504 U.S. at 573-74.

It is important to bring to this Court's attention the fact that many courts have interpreted and applied the *Gwaltney* decision in ways that are inconsistent with the language and reasoning of the Court's opinion and that improperly allow citizens to recover civil penalties for violations that are not ongoing. For example, some judges have ruled that, for purposes of the jurisdictional determination under section 505(a) of the Clean Water Act, a good-faith allegation that there is an ongoing violation of one pollutant parameter in a facility's permit is sufficient to establish jurisdiction over past violations of other

parameters regulated by the permit. *Public Interest Research Group of New Jersey v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164, 1173-76 (D. N.J. 1993); *Public Interest Research Group of New Jersey v. Yates Industries, Inc.*, 790 F. Supp. 511, 514-16 (D. N.J. 1991).

This so-called "permit-based" approach ignores the fact that an alleged violation of one permit limit may well be totally unrelated to past violations of other, distinct permit limits and that those past violations may have already been cured. Accordingly, it directly conflicts with *Gwaltney's* holding that citizen suits are to address only those ongoing violations where injunctive relief is required.[11] In light of the much greater number of potential sources of violations under the Clean Air Act at a large facility, this problem will be much more acute under that statute than under the Clean Water Act. By ruling that actions for civil penalties are only permissible for violations for which injunctive relief is necessary to compel compliance, this Court will diminish the likelihood that citizen suits will commonly be allowed where there are not real "ongoing" violations.

2. *The payment of civil penalties by a defendant for violations that are not ongoing would not redress private citizens' alleged injuries.*

To satisfy Article III, a plaintiff must show not only that it has suffered an injury but also that "it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.' " *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 38, 43 (1976)). A citizen-plaintiff seeking to recover civil penalties based

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[11] As discussed previously, courts have improperly interpreted the *Gwaltney* opinion's reference to "intermittent" violations as authorizing actions for civil penalties where there is no ongoing violation of the same requirement and injunctive relief is thus not necessary.

on past violations that are not ongoing could not satisfy the redressability prong of the three-part standing test.

The principal relief which would be requested in such an action—an order directing the defendant to pay civil penalties to the government—would not redress any injury suffered by the plaintiff. To establish standing, a plaintiff "must stand to profit in some personal interest." *Allen v. Wright*, 468 U.S. at 766 (citation omitted). The payment of penalty amounts to the government would not benefit the citizen-plaintiff in any personal way which could be differentiated from the benefit to the public at large. Certainly, the payment cannot be said to redress any concrete injury to the citizen-plaintiff.

Moreover, there is no other element of such a citizen suit that would redress any concrete injury allegedly suffered by a citizen-plaintiff. It is well-established that the redressability requirement of Article III cannot be satisfied by an interest in general deterrence or law enforcement, no matter how keenly held. *Diamond v. Charles*, 476 U.S. 54, 64-65 (1986). Money damages may not be awarded to the plaintiff in a citizen suit. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 17-18 (1981). Recovery of attorneys' fees and litigation costs cannot satisfy the redressability test. *Diamond v. Charles*, 476 U.S. at 70-71. In short, a citizen-plaintiff seeking to recover civil penalties based on past violations that are not ongoing will not be able to meet the redressability test required by Article III.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Clean Air Implementation Project urges that the Court reverse the decision below. In addition, CAIP requests that the Court make clear that citizen suits may only be brought where there is an ongoing violation and that the test for determining whether an ongoing violation exists is that injunctive relief must be necessary to compel compliance with applicable requirements. Otherwise, the private citizen would not have standing under Article III to bring the action.

Respectfully submitted,

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